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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Refugio Ceyala,

10 Plaintiff,

11 v.

12 Unknown Toth, et al.,

13 Defendants.  
14

No. CV-17-00529-TUC-DCB (LAB)

**ORDER**

15 This matter was referred to Magistrate Judge Leslie A. Bowman, pursuant to the  
16 Rules of Practice for the United States District Court, District of Arizona (Local Rules),  
17 Rule (Civil) 72.1(a). On March 5, 2020, Magistrate Judge Bowman issued a Report and  
18 Recommendation (R&R). (Doc. 71.) She recommends that the Court grant summary  
19 judgment for the Defendants because the shooting of Carlos Valencia was tragic but not an  
20 excessive use of force. She recommends summary judgment be granted on the state law  
21 claims because Plaintiff failed to comply with the notice of claim provisions in A.R.S. §  
22 12-821.01. The Court accepts and adopts the Magistrate Judge's R&R as the findings of  
23 fact and conclusions of law of this Court and grants summary judgment for Defendants.

24 **STANDARD OF REVIEW**

25 The duties of the district court in connection with a R&R by a Magistrate Judge are  
26 set forth in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The  
27 district court may "accept, reject, or modify, in whole or in part, the findings or  
28 recommendations made by the magistrate judge." Fed.R.Civ.P. 72(b); 28 U.S.C. §

1 636(b)(1). Where the parties object to a R&R, “[a] judge of the [district] court shall make  
 2 a de novo determination of those portions of the [R&R] to which objection is made.”  
 3 *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (quoting 28 U.S.C. § 636(b)(1)).

4 This Court's ruling is a *de novo* determination as to those portions of the R&R to  
 5 which there are objections. 28 U.S.C. § 636(b)(1)(C); *Wang v. Masaitis*, 416 F.3d 992,  
 6 1000 n. 13 (9th Cir.2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th  
 7 Cir.2003) (en banc). To the extent that no objection has been made, arguments to the  
 8 contrary have been waived. Fed. R. Civ. P. 72; see 28 U.S.C. § 636(b)(1) (objections are  
 9 waived if they are not filed within fourteen days of service of the R&R), *see also McCall*  
 10 *v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (failure to object to Magistrate's report  
 11 waives right to do so on appeal); Advisory Committee Notes to Fed. R. Civ. P. 72 (citing  
 12 *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974) (when no timely  
 13 objection is filed, the court need only satisfy itself that there is no clear error on the face of  
 14 the record in order to accept the recommendation)).

15 The parties were sent copies of the R&R and instructed that, pursuant to 28 U.S.C.  
 16 § 636(b)(1), they had 14 days to file written objections. *See also*, Fed. R. Civ. P. 72 (party  
 17 objecting to the recommended disposition has fourteen (14) days to file specific, written  
 18 objections). The Court has considered the objections filed by the Defendants, and the  
 19 parties' briefs considered by the Magistrate Judge in deciding the Motion for Summary  
 20 judgment.

## 21 OBJECTIONS

22 The Plaintiff, Refugio Ceyala, brings this action in her capacity as personal  
 23 representative of the estate of her deceased son, Carlos Valencia, who was shot and killed  
 24 by Defendant Toth. The Plaintiff filed objections to the R&R. She argues that the Court  
 25 “cannot simply accept the officer’s subjective version of events, but rather must reconstruct  
 26 the event in the light most favorable to the non-moving party and determine whether the  
 27 officer’s use of force was excessive under those circumstances.” (Objection (Doc. 72) at  
 28 2.) The Plaintiff is of course correct. Other than the Defendants and Mr. Valencia,

1 deceased, there were four witnesses to the event, but, unfortunately, they did not see the  
2 actual shooting. Discovery has been completed. It is undisputed that both Defendants were  
3 in marked police cars and uniforms, therefore, there are no issues regarding any failure by  
4 Defendants to announce their identities or that Mr. Valencia's non-compliance was due to  
5 confusion because it was not clear the Defendants were police officers.

6 The Court relies solely on the Plaintiff's statement of facts (Doc. 56), supporting  
7 her assertion that summary judgment should be denied, as stated below.

8 The circumstances of the case, which the Court finds dispositive begin with the 911  
9 phone call from the manager of the GRM, Gospel Rescue Mission, who reported that Mr.  
10 Valencia had created a disturbance, was asked to leave, and had stolen a fire extinguisher  
11 as he left. It is undisputed that the 911 transcript reflects Mr. Valencia was described as  
12 being a large man, over six feet tall and weighing more than 200 pounds, who was  
13 "unstable." The caller described him as having "anger rising up in his voice" and the caller  
14 sensed "the aggression in him." (Ps' SOF (Doc. 56) ¶¶ 2-3.) Plaintiff's assertion that  
15 Defendants had no information that Mr. Valencia was violent is simply not true.  
16 Defendants knew that he was unstable, agitated, and exhibiting signs of aggression and  
17 anger.

18 Police Officer Toth was the first Defendant to engage Mr. Valencia. He saw him  
19 walking with the fire extinguisher, which was two to two and a half feet long and 10 to 15  
20 pounds, and saw that Mr. Valencia was a large individual as described by the 911 caller.  
21 *Id.* ¶ 6-7. Defendant Toth yelled from inside his marked police car at Mr. Valencia to stop.  
22 *Id.* ¶ 11. Mr. Valencia did not stop. Instead, he walked faster. Defendant Toth contacted  
23 dispatch over his radio and reported that Mr. Valencia was being noncompliant. *Id.* ¶ 13.  
24 Defendant Toth brought his police car to a stop in front of Mr. Valencia, got out and again  
25 made contact by standing in front of him, telling him to stop and drop the fire extinguisher.  
26 When Mr. Valencia again failed to comply with Defendant Toth's directive, Defendant  
27 Toth deployed pepper spray. *Id.* ¶¶ 16-19. At this point, Defendant Toth knew the  
28 information gleaned from the 911 call related to Mr. Valencia being mentally unstable,

1 angry and aggressive, and he knew that Mr. Valencia was refusing to comply with the  
2 police directive to stop and drop the fire extinguisher.

3 In response to being pepper sprayed, Mr. Valencia raised the fire extinguisher over  
4 his head and threw it at Defendant Toth, hitting Defendant in the leg, and Mr. Valencia  
5 turned and ran, with Defendant Toth giving chase. *Id.* ¶¶ 19-20.

6 At this time, Defendant Nunez arrived on the scene. He exited his vehicle and  
7 ordered Mr. Valencia to stop and get on the ground. Mr. Valencia did not comply.  
8 Defendant Nunez got out his taser and was surprised that Mr. Valencia ran towards him  
9 first, before turning and running away. Ignoring Defendant Nunez' depiction of Mr.  
10 Valencia's behavior as aggressive, it is undisputed that the two Defendants gave chase,  
11 with Officer Nunez continuing to order Mr. Valencia to stop, and get on the ground, and  
12 Mr. Valencia ignoring Defendants' commands, running, and yelling profanities at the  
13 Defendants. *Id.* ¶¶ 26-27.

14 Eventually, Defendant Nunez got close enough to Mr. Valencia to deploy his taser.  
15 It hit him in the back, but was ineffective. *Id.* ¶¶ 34-36. After being tased, Mr. Valencia  
16 confronted Defendant Nunez, "yelling, with his arms up and fists clenched in a fighting  
17 stance but did not attack Defendant Nunez. *Id.* ¶ 34. Defendant Nunez again tried to use  
18 his taser, but it did not work. *Id.* ¶¶ 35, 43. At this point, Defendant Toth caught up to  
19 Officer Nunez and Mr. Valencia, and attempted to physically subdue Mr. Valencia. *Id.* ¶  
20 36. While Plaintiff disputes whether Mr. Valencia hit Defendant Toth with his fists and  
21 knocked him to the ground, Plaintiff admits that Defendant Toth fell to the ground. *Id.* ¶  
22 37.

23 Nunez called over his radio that they were engaged with a suspect who was  
24 physically assaulting officers and requested assistance. *Id.* ¶ 41. With his taser not working,  
25 Defendant Nunez deployed his firearm. All three were now walking because they were  
26 tired; Mr. Valencia leading, followed by the Defendants. *Id.* ¶ 45. Again, Defendant Toth  
27 attempted to physically subdue Mr. Valencia, using pepper spray, but his pepper spray was  
28 depleted. *Id.* ¶ 46. This time, Mr. Valencia knocked Defendant Toth down and hit him in

1 the head with his fists. *Id.* ¶ 48. Again, Mr. Valencia approached Defendant Nunez with  
 2 his hands up, yelling obscenities and acting aggressive. *Id.* ¶ 54. Mr. Valencia punched  
 3 Defendant Nunez in the head. *Id.* ¶ 56. Because Defendant Nunez had his firearm out, he  
 4 focused on protecting his firearm from being grabbed by Mr. Valencia. *Id.* ¶¶ 55 56. Then  
 5 Mr. Valencia turned to Defendant Toth, who had deployed his firearm after his pepper  
 6 spray was depleted. *Id.* ¶ 57. Mr. Valencia knocked Defendant Toth to the ground twice,  
 7 and they were struggling in close contact. *Id.* ¶ 60. Defendant Nunez was on the radio to  
 8 advise responding officers of their location. *Id.* ¶ 59. During this engagement, Defendant  
 9 Toth shot Mr. Valencia twice. *Id.* ¶ 60.

10 These undisputed facts construed in favor of the Plaintiff reflect that Mr. Valencia  
 11 refused to comply with police directives to stop and surrender to their arrest. He assaulted  
 12 both officers when they attempted to arrest him, and he gave them no choice but to  
 13 physically subdue him by force. They first used nonlethal force which was ineffective  
 14 before turning to the use of their guns.

15 To prevail on a section 1983 claim based on the Fourth Amendment, the Plaintiff  
 16 must show that the Defendants' conduct was an unreasonable seizure. (R&R (Doc. 71) at  
 17 7 (citing *Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 515 (9<sup>th</sup> Cir. 2018)). The  
 18 reasonableness calculation allows for the fact that police officers, like the Defendants, are  
 19 often forced to make split-second judgments in uncertain and tense circumstances that are  
 20 rapidly evolving. *Id.* at 7-8 (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). Use  
 21 of force "must be judged from the perspective of a reasonable officer on the scene, rather  
 22 than with the 20/20 vision of hindsight." *Id.*

23 The Court finds that the Magistrate Judge correctly found the Defendants did not  
 24 use excessive force. It was objectively reasonable to pepper spray and taser Mr. Valencia  
 25 because he refused to comply with verbal commands to stop, drop the fire extinguisher,  
 26 and get on the ground. Rather than complying, Mr. Valencia not only ran away, he  
 27 assaulted both Defendants. Under the circumstances, it was reasonable for the Defendants  
 28 to draw their weapons to obtain compliance. When Mr. Valencia again attacked Defendant

1 Toth, who's weapon was drawn, it was reasonable for Defendant Toth to believe he needed  
2 to shoot Mr. Valencia to keep him from getting the gun and using it on them. The  
3 Magistrate Judge correctly assessed the graduated use of force employed by the Defendants  
4 which culminated in lethal force when Officer Toth shot Valencia twice. (R&R (Doc. 71)  
5 at 8-11.)

6 This is not a case where an unarmed emotionally disturbed person, who has  
7 committed no serious offense, did not pose a risk of flight and presented no objectively  
8 reasonable threat to officer safety or other individuals. (R&R (Doc. 11) (citing *Deorle v.*  
9 *Rutherford*, 272 F.3d 1272, 1285 (9<sup>th</sup> Cir. 2001)). Mr. Valencia posed a serious threat to  
10 officer safety. Not addressed by the Magistrate Judge, the Court also finds that he posed a  
11 risk to the community at large. Officers, like Defendants, may have reasonably believed  
12 that a mentally disturbed person willing to take on police officers might injure some  
13 member of the community if let go.

14 The Magistrate Judge did not reach the question of qualified immunity, which  
15 requires a court to consider both: (1) whether there has been a violation of a constitutional  
16 right, and (2) whether that right was clearly established at the time of the officer's alleged  
17 misconduct. *Lal v. California*, 746 F.3d 1112, 1116 (9<sup>th</sup> Cir. 2014). Because the Magistrate  
18 Judge found no constitutional violation, there was no need to reach the second prong of the  
19 qualified immunity analysis. This Court agrees that the question of whether there has been  
20 a constitutional violation does not involve disputed facts which, when viewed most  
21 favorably to the Plaintiff, could support a rational jury finding in Plaintiff's favor. The  
22 Court has, however, also reviewed the case law submitted by the Plaintiff and finds that  
23 there is no clearly established law that would have led reasonable police officers to  
24 understand the actions taken here were unlawful. The law does not "require a case directly  
25 on point, but existing precedent must have placed the ... constitutional question beyond  
26 debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011). There must be precedent involving  
27 similar facts to provide an officer notice that a specific act is constitutionally unlawful.  
28 *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curium). The Plaintiff has offered none

1 and the Court has found no case to suggest deploying lethal force is excessive in  
2 circumstances like those faced by the Defendants here.

3 Finally, the Defendants seek summary judgment on the state law claims based on  
4 A.R.S. § 12-821.01, which requires the claimant, Plaintiff, to have filed a notice of claim  
5 and settlement offer. Here, she sues the Defendants individually but served her notices of  
6 claim on the City Clerk of the City of South Tucson. Plaintiff's argument that such service  
7 is proper was rejected in *Simon v. Maricopa Med. Ctr.*, 234 P.3d 623, 629 (Ariz. App.  
8 2010). The Court adopts the Magistrate Judge's recommendation that summary judgment  
9 be granted for Defendants on Plaintiff's state law claims.

### 10 CONCLUSION

11 The Court finds that Magistrate Judge Bowman issued a well-reasoned R&R, which  
12 explains the law and the facts. After *de novo* review of the issues raised in Plaintiff's  
13 objections, this Court agrees with the findings of fact and conclusions of law made by the  
14 Magistrate Judge in her R&R for determining the pending Motion for Summary Judgment.  
15 The Court adopts it, and for the reasons stated in the R&R, the Court grants summary  
16 judgment for Defendants.

17 **Accordingly,**


18 **IT IS ORDERED** that after a full and independent review of the record, in respect  
19 to the objections, the Magistrate Judge's Report and Recommendation (Doc. 71) is accepted  
20 and adopted as the findings of fact and conclusions of law of this Court.

21 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment  
22 (Doc. 48) is GRANTED.

23 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter Judgment,  
24 accordingly.

25 Dated this 29th day of September, 2020.

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David C. Bury  
United States District Judge